5601

(21)

AUG 22 2006
FILED

No. 04-1350

IN THE

Supreme Court of the United States

KSR INTERNATIONAL CO.,

Petitioner,

v.

TELEFLEX, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA — PATENT, TRADEMARK & COPYRIGHT SECTION IN SUPPORT OF NEITHER PARTY

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BRIEF FOR AMICUS CURIAE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA – PATENT, TRADEMARK & COPYRIGHT SECTION IN SUPPORT OF NEITHER PARTY

THE INTEREST OF AMICUS CURIAE

The Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia ("Association") respectfully submits this brief as amicus curiae in support of neither party.[1]

The Association is one of the senior-most intellectual property bar associations in the United States, drawing its membership from government, industry and private practice. The Association and its members have a substantial interest in the adjudication of significant issues defining our patent laws, and only submit amicus curiae briefs when issues of such magnitude arise. The case at bar presents such an important issue, namely defining the evidentiary standard for determining obviousness under 35 U.S.C. § 103(a). The Association seeks to assist the Court by directing its attention to the rationale behind existing Federal Circuit precedence assessing obviousness, and the importance of including such rationale in any changes this Court might make to this evidentiary standard.

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[1] This amicus curiae brief is presented by the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia under Supreme Court Rule 37.3(a). The parties have consented to the filing of this amicus curiae brief in papers docketed with this Court on July 19, and July 31, 2006. In accordance with Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored any part of this brief. Only this amicus curiae made a monetary contribution to the preparation and submission of this brief. Counsel for amicus curiae prepared this brief on a pro bono basis.

SUMMARY OF THE ARGUMENT

In its landmark Graham case in 1966, this Court established a set of four factors for assessing obviousness. Lower courts, in implementing the teachings of Graham over the past forty years, developed subtests designed to objectively weigh these factors in a case-by-case manner. One such test, the motivation-suggestion-teaching test, was crafted by the Federal Circuit to address the very real problem of improperly injecting hindsight into the obviousness evaluation. As a subtest of Graham, the Federal Circuit's motivation-suggestion-teaching criteria provide a roadmap that patent examiners, members of the bar, and courts alike follow to avoid the pitfalls of applying hindsight in obviousness reviews. When properly applied, the motivation-suggestion-teaching test, like the Graham factors from which it stems, assists in genesis and enforcement of valid patents. Although it might benefit from some refinement, the heart of this Federal Circuit subtest is consistent with Graham, serves a useful purpose, and should be incorporated into any additional guidelines this Court may devise for evaluating the obviousness standard articulated by Congress in 35 U.S.C. § 103(a).

ARGUMENT

I. GRAHAM PROVIDES A WORKABLE FRAMEWORK FOR ASSESSING PATENTABILITY

The Association endorses the standard of patentability announced in Graham v. John Deere Co., 383 U.S. 1 (1966). The Association submits that the Graham standard, when followed correctly, should result in issuance by the U.S. Patent and Trademark Office (PTO) of patents with high probability of validity. The properly applied standard also provides trial courts with the necessary guidance to adjudicate obviousness issues that arise in connection with granted patents.

The Graham standard itself originated from the leading case this Court selected for addressing obviousness arising under our patent laws. Graham was one of four cases selected for the initial review of the non-obviousness standard introduced in 1952 under what is today restyled as 35 U.S.C. § 103(a).[2] It took the Court more than a decade from the enactment of the 1952 statute to reach its both thorough and well-reasoned landmark ruling in Graham. The result was a decision that provides a reliable and predictable framework for the administration of obviousness jurisprudence.

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[2] As stated in Adams Battery – the fourth case - it "is a companion case to No. 11, Graham v. John Deere Co., 383 U.S. 1, decided this day [that includes] Nos. 37 and 43, Calmar, Inc. v. Cook Chemical Co. and Colgate-Palmolive Co. v. Cook Chemical Co." United States v. Adams, 383 U.S. 39, 40 (1966). Adams Battery "is controlled on the merits by ... Graham ... ." 383 U.S. at 41.

The message from the Graham court is a collection of four factors for determining obviousness, factors still followed by district and appellate courts today. Those factors are: 1) the scope and content of the prior art; 2) the differences between the prior art and the claimed invention; 3) the level of skill in the art; and 4) the objective indicia of nonobviousness. Graham, 383 U.S. at 17; In re Kahn, 441 F.3d 977, 987 (Fed. Cir. 2006); Eli Lilly & Co. v. Zenith Goldline Pharms., Inc., 364 F. Supp. 2d 820 (S.D. Ind. 2005). In crafting these factors, the Graham Court recognized that the heart of the obviousness inquiry turns on whether an invention is the result of ingenuity and skill, or is merely the handiwork of a skilled mechanic. The Court, therefore, fashioned a practical framework for differentiating the patentable from the nonpatentable on a fact intensive, case-by-case basis.

In the instant case, Petitioner argues for obviousness of the claim at issue – claim 4 – as merely a combination of old parts "compris[ing] nothing more than (i) a pre-existing 'adjustable pedal assembly,' combined with (ii) a pre-existing 'electronic control.'" Petitioners' Petition for certiorari at 6. Respondent argues for non-obviousness of the claim as an improvement over the prior art combination that involved an inefficient use of critical footwell space. According to the Respondent, the invention of claim 4 is a unique *arrangement* of old components, which overcame the difficulty of insufficient footwell space. Respondent's Opposition to Petition for certiorari at 5-6. The Association takes no position on the merits of this dispute: whether the patent in-suit is invalid under 35 U.S.C. § 103(a) under the proper Graham analysis.

The Graham decision is flexible in its application, providing our courts sufficient leeway to assess obviousness

issues on a case-by-case basis for the past forty years. Graham is still viable law, and the Association sees no reason to modify the Graham factors in the adjudication of this, or any other pending patent dispute. The Association does, however, believe that the Court should seize the instant case as a platform to enunciate additional guidelines for assessing obviousness under the flexible framework set forth years ago in Graham. After all, Graham does not specify how courts, patent examiners, or members of the bar should weigh the relevant factors in making an obviousness determination in any particular case. Consequently, courts, the Federal Circuit included, necessarily engineered their own subtests for implementing Graham.

II. MAINSTREAM FEDERAL CIRCUIT PRECEDENT IS PROPERLY GROUNDED IN GRAHAM

The Association submits that any additional guidelines should not ignore the wisdom of over twenty years of mainstream Federal Circuit precedent addressing obviousness, including that court's now embattled motivation-suggestion-teaching test. This test evolved over the Federal Circuit's lifetime as a means for addressing a serious impediment to objective evaluation of obviousness, namely the interjection of hindsight into the calculus by the evaluator. "We 'cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.'" Ecolochem, Inc. v. S. Cal. Edison Co., 227 F.3d 1361, 1371 (Fed. Cir. 2000) (citing In re Fine, 837 F.2d 1071, 1075 (Fed. Cir. 1988)). By invoking hindsight, evaluators are prone to the notorious pitfall of declaring true inventions merely unpatentable combinations of old elements. See Envtl. Designs, Ltd v. Union Oil Co., 713 F.2d 693, 698 (Fed. Cir. 1983) ("[V]irtually all

[inventions] are combinations of old elements."). According to the Federal Circuit:

> As this court has stated, "virtually all [inventions] are combinations of old elements." Therefore, an examiner [or accused infringer] may often find every element of a claimed invention in the prior art. If identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would ever issue. Furthermore, rejecting patents solely by finding prior art corollaries for the claimed elements would permit an examiner [or accused infringer] to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat patentability of the claimed invention. ... To counter this potential weakness in the obviousness construct, the suggestion to combine requirement stands as a critical safeguard against hindsight analysis and rote application of the legal test for obviousness.

In re Rouffet, 149 F.3d 1350, 1357-58 (Fed. Cir. 1998) (internal citations omitted).

The Federal Circuit did not impetuously craft its motivation-suggestion-teaching test out of invisible cloth. Rather, this rational test finds its underpinnings in the text of Section 103 itself, which mandates that obviousness be determined in view of the differences between the claimed "subject matter as a whole" and the prior art. See Ruiz v. A.B. Chance Co., 357 F.3d 1270, 1275 (Fed. Cir. 2004) ("The 'as a whole' instruction in title 35 prevents evaluation

of the invention part by part."). As explained by the Ruiz court, "Section 103 precludes this hindsight discounting of the value of new combinations by requiring assessment of the invention as a whole." Id. This Federal Circuit test is designed to provide "further assurance of an 'as a whole' assessment of the invention under § 103 by requiring a showing that an artisan of ordinary skill in the art at the time of the invention, confronted by the same problems as the inventor and with no knowledge of the claimed invention, would select the various elements from the prior art and combine them in the claimed manner." Id. Thus, to avoid the application of hindsight, and to ensure compliance with the "as a whole" mandate of Section 103, the Federal Circuit devised its test such that "the examiner or court must show some suggestion or motivation, before the invention itself, to make the new combination." Id.

The motivation-suggestion-teaching test was developed by the Federal Circuit as a practical working extension of Graham in an effort to guard against the invocation of hindsight in the obviousness calculus. As explained by the Federal Circuit:

> The assessment of whether to combine references in a given case has sometimes been viewed conceptually as a subset of the first Graham factor, the scope and the content of the prior art. Although that view is not incorrect, accurate assessment of whether to combine references may require attention to other Graham factors. For example, the level of skill in the art may inform whether the artisan would find a suggestion to combine in the teachings of an exemplar of prior art. Where the level of skill is high, one may

> assume a keener appreciation of nuances taught by the prior art. Similarly, appreciation of the differences between the claims in suit and the scope of the prior art references – a matter itself informed by the operative level of skill in the art-informs the question of whether to combine prior art references. At bottom, in each case the factual inquiry whether to combine references must be thorough and searching.

McGinley v. Franklin Sports, Inc., 262 F.3d 1339, 1351-52 (Fed. Cir. 2001) (internal citations omitted). Similarly, the Federal Circuit states in In re Johnston, 435 F.3d 1381, 1385 (Fed. Cir. 2006):

> As precedent illustrates, many factors are relevant to the motivation-to-combine aspect of the obviousness inquiry, such as the field of the specific invention, the subject matter of the references, the extent to which they are in the same or related fields of technology, the nature of the advance made by the applicant, and the maturity and congestion of the field. Objective indicia are also relevant, see Graham v. John Deere Co., 383 U.S. 1 (1966), for the commercial response to an invention is a useful control upon hindsight evaluation of obviousness.

As is evident from the quoted passages, the Federal Circuit acknowledges that its test is a subset of one or more Graham factors, designed to implement the directive of this Court. Accordingly, when viewed in context of the Federal Circuit's body of obviousness precedent, the motivation-

suggestion-teaching test is consistent with this Court's teaching in Graham. The test requires a patent examiner or court to view the prior art through the prism of the skilled artisan, without using the claimed invention itself as a cheat sheet for guidance. The suggestion to combine references prevents evaluators from cherry-picking prior art while using claims as blueprints for their selections. This is a particularly important safeguard when the art in question is relatively simple. See McGinley, 262 F.3d at 1351.

Thus, contrary to the assertions of some, particularly those who have never been on either end of a patent examination,[3] this test provides a beneficial tool for objectively evaluating a claimed invention through the eyes of one of ordinary skill in the art. While not perfect, the test does provide a rational basis for assessing evidence of patentability in view of the Graham factors. The Association submits that when properly applied, the motivation-suggestion-teaching test aids in the genesis and enforcement of valid patents.

III. GUIDANCE FOR IMPLEMENTING GRAHAM SHOULD INCORPORATE FEDERAL CIRCUIT PRECEDENT

Graham requires courts to determine the scope and content of the prior art and ascertain the differences between the prior art and the claims at issue, while resolving the level of ordinary skill in the pertinent art. Against this background, courts determine whether the claimed subject matter would have been obvious to a person of ordinary

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[3] Amicus Brief for Twenty-Four Intellectual Property Law Professors at 5-7 (accusing the Federal Circuit of departing from the mandate of evaluating obviousness from the perspective of one of ordinary skill in the art).

skill in the art at the time the claimed invention was made. Graham, 383 U.S. at 13-17. Relying on the motivation-suggestion-teaching test, mainstream Federal Circuit precedent provides a workable obviousness standard consistent with Graham to objectively eliminate the possibility of hindsight-based obviousness analysis.

In order to avoid the use of such improper hindsight, the Federal Circuit requires the considered prior art to be drawn from references "either in the field of the applicant's endeavor or [] reasonably pertinent to the problem with which the inventor was concerned." In re Kahn, 441 F.3d at 987. This requirement provides an objective standard in the first stage of the obviousness analysis for excluding irrelevant prior art. The Federal Circuit instructs that the suggestion to combine references may be expressly stated, or may flow from the nature of the problem solved, but cautions against "defining the problem in terms of its solution," which invites hindsight selection of the prior art relevant to obviousness. Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH, 139 F.3d 877, 880 (Fed. Cir. 1998).

The Federal Circuit also recognizes that an express teaching in the prior art that announces the identity and selectability of claimed elements from various prior art sources is an uncommon find in patent law. In re Johnston, 435 F.3d at 1385 ("An explicit teaching that identifies and selects elements from different sources and states that they should be combined in the same way as in the invention at issue, is rarely found in the prior art."). Thus, the suggestion or motivation to combine claimed features "need not be expressly stated." B.F. Goodrich, Co. v. Aircraft Braking Sys. Corp., 72 F.3d 1577, 1582 (Fed. Cir. 1996).

Rather, the Federal Circuit cautions:

> While this court indeed warns against employing hindsight, its counsel is just that – a warning. That warning does not provide a rule of law that an express, written motivation to combine must appear in prior art references before a finding of obviousness. Stated differently, this court has consistently stated that a court or examiner may find a motivation to combine prior art references in the nature of the problem to be solved.

Ruiz, 357 F.3d at 1276. Accordingly, a motivation to combine references may be inherently present in the prior art. In re Napier, 55 F.3d 610, 613 (Fed. Cir. 1995) ("The inherent teaching of a prior art reference, a question of fact, arises both in the context of anticipation and obviousness."). As explained by Circuit Judge Newman, "the purpose of the rule of inherency is to accommodate common knowledge, knowledge that judges might not know but that would be known to practitioners in the field." Natalie M. Derzko, The Impact of Recent Reforms of the Hatch-Waxman Scheme on Orange Book Strategic Behavior and Pharmaceutical Innovation, 45 Idea 165, 238 n.377 (2005); see also Finnigan Corp. v. Int'l Trade Comm'n, 180 F.3d 1354, 1365 (Fed. Cir. 1999).

Moreover, the Federal Circuit directs that "mere identification in the prior art of each element is insufficient to defeat the patentability of the combined subject matter as a whole. Rather, a party alleging invalidity due to obviousness must articulate the reasons one of ordinary skill in the art would have been motivated to select the references and to combine them to render the claimed invention obvious." Abbott Labs. v. Andrx Pharms., Inc., 452 F.3d

1331, 1336 (Fed. Cir. 2006). The "motivation" requirement on the part of the skilled artisan acts as another objective standard of the obviousness analysis, working in harmony with secondary indicia of nonobviousness that must also be considered, if in evidence. Graham, 383 U.S. at 17-18; Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 1538-39 (Fed. Cir. 1983).[4] As reasoned by the Federal Circuit, the requirement for an explanation of the motivation, suggestion, or teaching to combine references "guards against hindsight in all cases – whether or not the applicant offers evidence on secondary considerations" of nonobviousness. In re Kahn, 441 F.3d at 986. The logic permeating this precedent is evident, and over the years has generally served patent law well. Yet, as with any dynamic entity, there is room in our patent jurisprudence for improvement.

The Association submits that Federal Circuit's motivation-suggestion-teaching test provides an excellent starting point in an obviousness analysis. The Association acknowledges that it is likely difficult, if not impossible, to devise an obviousness test that is dispositive of all situations. The test is more amenable to some art fields than other fields. Thus, the ability to glean a motivation to combine references from the nature of the problem to be solved "is particularly relevant with simpler mechanical technologies." Ruiz, 357 F.3d at 1276. The Association recognizes that the motivation-suggestion-teaching test may be impractical in

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[4] The objective indicia of nonobviousness include the extent of commercial success of the patented invention, unexpected properties of the invention compared to the prior art, whether the invention satisfies a long-felt need, whether others have failed to find a solution to the problem plaguing the art, and any copying of the invention by others. Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966); Stratoflex Inc. v. Aeroquip Corp., 713 F.2d 1530, 1538-39 (Fed. Cir. 1983).

certain fields in which custom provides little incentive for skilled artisans to memorialize in the prior art that which is known and mundane. In those art fields, application of the motivation-suggestion-teaching test precluding hindsight may not adequately reach the issue of obviousness, and other tests must be employed.

Certain amici targeted these difficult fields in an effort to persuade this Court that the Federal Circuit's motivation-suggestion-teaching test is so fatally flawed as to deserve a swift and permanent burial. To do so, in the Association's view, would foolishly set the clock of patent jurisprudence back to the 1980s. It is particularly unnecessary in the instant case, which is a non-precedential decision not citable to the Federal Circuit under its local Rule 47.6(5). While the truncated language of some Federal Circuit opinions may suggest that the motivation-suggestion-teaching test permits clearly invalid patents to go unchecked, a balanced view of Federal Circuit precedent illuminates a reasonable test applied effectively by courts and the PTO when assessing obviousness. See, e.g., In re Gartside, 203 F.3d 1305, 1319-1320 (Fed. Cir. 2000) (agreeing with Board's rationale for a motivation to combine references and its finding of obviousness); In re Kahn, 441 F.3d at 991 (affirming Board's factual determinations on motivation to combine as a basis for finding claims prima facie obvious); Ruiz, 357 F.3d at 1276 (supporting district court's conclusion that the prior art provided motivation to combine references, rendering claims obvious).

While the motivation-suggestion-teaching test may be used as an initial test for implementing Graham, this Court could craft other secondary tests that by themselves, or in combination with motivation-suggestion-teaching test, address obviousness issues in fields not amenable to explicit

or implicit suggestions for combining prior art. An approach that includes casting a wider, more inclusive evidentiary net, without sacrificing established standards, should be taken to avoid tossing the proverbial baby out with the bathwater. Other secondary considerations, such as long-felt need and teachings against the combination, should still mitigate against any additional putative or administrative showings in harmonious accord with the Graham standards. Given that some type of obviousness fact finding is mandated under Graham, a court or the PTO cannot conclude that a claimed invention would have been obvious unless it makes such findings. The facts relevant to a teaching, suggestion, or motivation to combine prior art in the particular manner claimed by the patent at issue should be considered in the process. A flexible approach that allows ample room to rely on teachings, suggestions, or motivations as a sufficient basis for a finding of obviousness is generally a sound prerequisite to an obviousness determination in most cases.

Whatever is devised, any new guidelines should prevent the application of rigid categorical rules that would inflexibly limit the ability of the courts or the PTO to make individualized determinations of obviousness. However, new guidelines should not permit a return to the rampant use of hindsight by patent examiners or accused infringers that the motivation-suggestion-teaching test sought to curb. The existence of administrative remedies, which should satisfy the need for enhanced evidence in many questionable cases (e.g., 37 C.F.R. § 1.144), already go a long way toward resolving latent questions of obviousness, particularly in combination with the publication of most U.S. applications. Publication of patent applications in areas where latent questions of obviousness often arise allows interested parties to provide additional art relevant to the published claims. Resort may be made to additional fact finding associated

with other secondary tests if the showing required for the motivation-suggestion-teachings test is difficult or impossible. Such an approach would address concerns of practitioners in newly emerging technical fields, or in situations in which a combination of claimed elements is so obvious that persons skilled in the art lack incentive to record them.

CONCLUSION

The Association respectfully submits that the Federal Circuit's motivation-suggestion-teaching test is generally sound precedent that is consistent with, and is an extension of, this Court's teachings in Graham. While the Association agrees that this test is not always a perfect fit for emerging technologies, it does provide a sound basis for beginning an obviousness determination without the application of hindsight. Any revisions to the criteria set forth in Graham for evaluating obviousness should incorporate the rationale of the Federal Circuit's precedence implementing the motivation-suggestion-teaching test to avoid a relapse into hindsight-tainted determinations by our courts and the PTO.

Respectfully submitted,

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August 22, 2006